Supreme Court, U.S.
FILED
MAR 26 1998
CLERK

(9)

No. 97-1078

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CATHERINE A. GHIGLIERI,
TEXAS BANKING COMMISSIONER,
Petitioner

v.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS;
AND COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit
Case Nos. 96-50847, 96-50948 and 96-10818

REPLY BRIEF FOR THE PETITIONER

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DAVID MATTAX
Assistant Attorney General

D'ANN JOHNSON*
Special Assistant Attorney General
Texas Department of Banking
2601 North Lamar Boulevard
Austin, Texas 78705-4294
(512) 475-1327

STEVEN A. FLECKMAN†
JULIA B. KENNER
BRIAN L. BURGESS
Fleckman & McGlynn
515 Congress Ave., Ste. 1800
Austin, Texas 78701

* *Counsel of Record*

† *Of Counsel*

18 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. An Interpretation of a Federal Agency that Contradicts the Plain Language of the Statute is Not Entitled to Deference. 2

A. Since the filing of the Petition for a Writ of Certiorari, this court has issued its opinion in *National Credit Union Administration v. First National Bank and Trust Co., et al.*, ___ U.S. ___, 118 S.Ct. 927 (1998) ("*NCUA*"). In that case, this Court held that the federal agency interpretation was contrary to the unambiguously expressed intent of Congress and, therefore, impermissible under the first step of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). 2

II. The Legislative History is Not Contrary to the Textual Analysis of the National Bank Act. 4

III. Ambiguous Legislative History Cannot Change the Plain Language of the Statute. 5

IV. The Decisions Conflict withh Opinions of this Court and other Circuits. 8

A. The Court of Appeals' decision allowing implied branching authority conflicts with a long-standing decision of this Court. 9

B. The Court of Appeals has decided a question of deference in a way that conflicts with the decisions of this Court. 9

C. The Court of Appeals decision conflicts with similar cases from other Circuits. 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Barnett Bank of Marion County v. Nelson,
517 U.S. 25, 116 S.Ct. 1103, 1107 (1996) . . . **10**

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) **2-5, 7, 10**

Clark v. Securities Indus. Ass'n.,
479 U.S. 388, 107 S.Ct. 750 (1987) **4**

First Nat'l Bank in St. Louis v. Missouri,
263 U.S. 640, 44 S.Ct. 213 (1924) **9, 11**

First Nat'l Bank of Logan v. Walker Bank and Trust Co.,
385 U.S. 252, 87 S.Ct. 492 (1966) **4, 11**

Ghiglieri v. Ludwig,
125 F.3d at 944 (Pet. App. B-6) **3**

National Credit Union Administration v. First National Bank and Trust Co., et al., ___ U.S. ___,
118 S.Ct. 927 (1998) **2**

STATUTES

12 U.S.C. §36. 2

12 U.S.C. §93a 10

N.M. STAT. ANN. §§58-1C-4, 58-1C-5, 58-1C-6, 58-1C-7, 58-1C-8 (1996) 10

TEX. FIN. CODE ANN. §32.0095 (Vernon Supp. 1998) . . . 10

LEGISLATIVE HISTORIES

H.R. CONF. REP. NO. 651, 103d Cong., 2d Sess. 53, 51 (Aug. 2, 1994) (Pet. App. L-19) 5

OTHER

Decision of the Office of the Comptroller of the Currency on the Applications of First Fidelity Bank, N.A., Penn., and First Fidelity Bank, N.A., N.J. (Jan. 10, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644, at 83,983 6

Decision of the Office of the Comptroller of the Currency on the Applications of Bank Midwest of Kansas, N.A., and Bank Midwest,N.A., Missouri (Feb. 16, 1995), *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep.(CCH)¶ 90,474 6

No. 97-1078

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CATHERINE A. GHIGLIERI,
TEXAS BANKING COMMISSIONER,
Petitioner

v.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS;
AND COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit
Case Nos. 96-50847, 96-50948 and 96-10818

REPLY BRIEF FOR THE PETITIONER

This case presents issues of extraordinary importance to the state and national banks in Texas that must compete with two banks that, through the administrative invention of implied authority, may retain interstate branches. The Court of Appeals' ruling adversely affects nearly 900 banks in Texas and thousands of banks throughout the country that compete with interstate branches established outside the Congressional design implemented in the Riegle-Neal Interstate Bank and Branching Efficiency

Act of 1994 ("Riegle-Neal") and, without explanation, overturns long-standing decisions of this Court.

I. An Interpretation of a Federal Agency that Contradicts the Plain Language of the Statute is Not Entitled to Deference.

A. Since the filing of the Petition for a Writ of Certiorari, this court has issued its opinion in *National Credit Union Administration v. First National Bank and Trust Co., et al.*, ___ U.S. ___, 118 S.Ct. 927 (1998) ("*NCUA*"). In that case, this Court held that the federal agency interpretation was contrary to the unambiguously expressed intent of Congress and, therefore, impermissible under the first step of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").

The Fifth Circuit, like the district court in *NCUA*, adopted an agency interpretation that reads some words out of the statute entirety. See *NCUA* at 930. Rather than considering the complete statutory scheme of the National Bank Act, the Fifth Circuit ignored the branching restrictions of Section 36. *12 U.S.C. §36.*

Judge Reaveley, in his concurrence in the Court below, specifically stated that the National Bank Act "is not silent with respect to the retention of branches after a relocation of the main office. Section 36 begins: 'The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:'". *Ghiglieri v. Ludwig,* 125 F.3d at 944 (Pet. App. B-6).

This Court has made clear that when there is no ambiguity in the statute, deference is inappropriate. See, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 843 n.9,104 S. Ct. At 2781-82 n.9. Under the agency interpretation, Section 36 is mere surplusage because a national bank had the authority to retain existing branches whenever it changed the location of its main office. The agency interpretation not only renders Section 36 unnecessary but makes the adoption of the landmark Riegle-Neal Act a futile congressional gesture. Such an interpretation cannot be squared with the plain language or legislature history of the National Bank Act, the McFadden Act or the Riegle-Neal Act.

II. The Legislative History is Not Contrary to the Textual Analysis of the National Bank Act.

Branching is not an area about which Congress has been silent. There is no dispute that the purpose of the McFadden Act is to provide competitive equality between state and national banks in the matter of branch banking. *First Nat'l Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252, 87 S.Ct. 492 (1966); *Clark v. Securities Indus. Ass'n.*, 479 U.S. 388, 107 S.Ct. 750 (1987).

The legislative history of the Riegle-Neal Act does not compel a different result. Not one comment indicates that competitive equality in the area of branching is relegated to an historical footnote. Instead, the language and structure of the Riegle-Neal Act is consistent with the doctrine of competitive equality. Despite this clear purpose to put state and national banks on equal footing in the area of branching, the Court below makes no mention of this overriding Congressional purpose in its step one *Chevron* analysis. Consequently, the Court errs in deferring to an agency interpretation that neither complies with the plain language

nor promotes the Congressional purposes behind the National Bank Act.

III. Ambiguous Legislative History Cannot Change the Plain Language of the Statute.

There is no gap in the statute on the question of retention of branches. Because the plain language of Section 36 indicates the conditions under which a national bank can retain branches, the court below misapplied *Chevron* by failing to discern congressional intent from the statute's text and purpose.

The Conference Report, on the other hand, is ambiguous on this issue. Although the Report indicates Congressional approval of the Comptroller's actions in two interstate relocations, it qualifies the comment by requiring the adherence to state law. H.R. CONF. REP. NO. 651, 103d Cong., 2d Sess. 53, 51 (Aug. 2, 1994) (Pet. App. L-19) ("Conference Report"). This ambiguity in the Conference Report can be understood by reviewing the two decisions. Until 1994, the Office of the Comptroller of Currency

("Comptroller") and its predecessors consistently interpreted the National Bank Act to prohibit the retention of interstate branches when a bank moved its headquarters across state lines. In that year, the Comptroller reversed this long standing policy when two banks with pre-1927 branches moved across state lines. The Comptroller, in those decisions, applied alternative rationales to permit the retention of out of state branches. First, the Comptroller articulated an implied adjunct authority to Section 30 to authorize the retention of existing branches. *Decision of the Office of the Comptroller of the Currency on the Applications of First Fidelity Bank, N.A., Penn., and First Fidelity Bank, N.A., N.J.* (Jan. 10, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644, at 83,983 ("*First Fidelity*"). Alternatively, the Comptroller asserted the retention of branches was authorized under 36(a) for the pre-1927 branches. *Id.* Not until after the passage of the Reigle-Neal Act did the Comptroller issue an opinion relying only an implied authority to retain branches. *See Decision of the Office of the Comptroller of the Currency on the Applications of Bank*

Midwest of Kansas, N.A., and Bank Midwest,N.A., Missouri (Feb. 16, 1995), *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep.(CCH)¶ 90,474.

Using this ambiguous paragraph to alter the meaning of statutory language and well known Congressional purposes highlights the dangers of relying on isolated portions of legislative history to discern Congressional intent. While legislative history may inform the judicial inquiry in the step one analysis of *Chevron*, it should not be used to change the language that best indicates Congressional intent.

Relying on this isolated paragraph, Respondents repeatedly assert that the amendments to §30 and §36 adopted in the Riegle Neal Act are new limitations on existing authority. Again, a review of the statutory language shows that this is not the case. Except for pre-1927 branches, §36 nowhere provided for the establishment or retention of interstate branches. Absent the amendments, national banks would lack the authority to establish,

maintain, or operate interstate branches, even where state law allowed.[1] Rather than a restriction, the amendments were both necessary and consistent with the new authority to operate interstate branches. Their effective date coincided with the June 1, 1997 advent of nationwide branching.

IV. The Decisions Conflict with Opinions of this Court and other Circuits.

Respondents oppose plenary review by this court. They assert that there is no conflict with this court or among the circuits and that a decision will not apply to future transactions. Those assertions are without merit.

---

[1]Section 36(c) only authorizes establishing branches in the state.

A. The Court of Appeals' decision allowing implied branching authority conflicts with a long-standing decision of this Court.

The question presented posed by the Federal Respondent highlights the conflict between the Court of Appeals' decision and a long-standing decision of this Court. *See, First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 44 S.Ct. 213 (1924) ("*St. Louis*"). *St. Louis* makes clear that a national bank has no implied or incidental power to branch. See, Pet. 16-21. The Fifth Circuit decision overturns this Court's decision in *St. Louis*. In addition, the decision of the Court of Appeals creates branching power where there has been none and overturns the doctrine of competitive equality without comment. See Pet. 24-28.

B. The Court of Appeals has decided a question of deference in a way that conflicts with the decisions of this Court.

The rationale for the application deference is that Congress has implicitly or explicitly delegated the authority

"to fill in the gaps" to the executive agency. *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782. Even if there were a gap to fill, Congress has explicitly withheld authority from the Comptroller to determine branching policy. See 12 U.S.C. §93a. There is no grounds to presume legislative delegation to the Comptroller in the area of branching. See also, *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 116 S.Ct. 1103, 1107 (1996).

C. The Court of Appeals decision conflicts with similar cases from other Circuits.

Respondents attempt to distinguish this case from other Circuit Court decisions involving applications for simultaneous relocations and branch-backs to the former main office. But in each of these other decisions, the Courts noted that the branch-back complied with state law. (Pet. 24-28) In the two decisions contested here, no state bank could branch from New Mexico into Texas or from Texas to Arkansas. TEX. FIN. CODE ANN. §32.0095 (Vernon Supp. 1998); N.M. STAT. ANN. §§58-1C-4, 58-1C-5, 58-1C-6, 58-

1C-7, 58-1C-8 (1996). Because the Fifth Circuit has frustrated the clear Congressional policy to foster a climate of competetive equality in contrast with the other Circuits, this Court should resolve the conflict.

CONCLUSION

This Court should determine whether *St. Louis* is no longer the law. In addition, if the authority of a national bank to branch is not tied to state law, this Court, not the Fifth Circuit, should overturn *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U. S. 252, 87 S. Ct. 492 (1966).

This court should also decide the important question regarding the unprecedented imbalance in the dual banking system caused by the Fifth Circuit decision. Deference to the Comptroller to determine the power of a national bank to branch eliminates the cornerstone of the dual banking system. Congress has never implicitly or explicitly

delegated to the Comptroller, the ability to determine branching power or policy. In the face of such a clear restriction on delegation and the plain language of the National Bank Act, deference is not warranted.

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted this 27th day of March, 1998.

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DAVID MATTAX
Assistant Attorney General

D'ANN JOHNSON*
Special Assistant Attorney General
Texas Department of Banking
2601 North Lamar Boulevard
Austin, Texas 78705-4294
(512) 475-1327

STEVEN A. FLECKMAN†
JULIA B. KENNER
BRIAN L. BURGESS
Fleckman & McGlynn
515 Congress Ave., Ste. 1800
Austin, Texas 78701

* *Counsel of Record*

† *Of Counsel*

ATTORNEYS FOR PETITIONER